Peerless Plating Company, Inc. *and* **Christopher Morse.** Case 7-CA-18379

September 13, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On May 5, 1982, Administrative Law Judge William A. Pope II issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Peerless Plating Company, Inc., Muskegon, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order as so modified:

1. Substitute the following for paragraph 2(b):

"(b) Expunge from its files any reference to the reprimand and discharge of Christopher Mark Morse for his participation in protected concerted activity, and notify him in writing that this has been done and that evidence of this unlawful conduct will not be used as a basis for future personnel actions against him."

2. Insert the following as paragraph 2(d) and reletter the subsequent paragraphs accordingly:

"(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discharge or reprimand employees because of their participation in protected concerted activities.

WE WILL NOT promulgate an overly broad no-solicitation rule.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them under the Act.

WE WILL offer Christopher Mark Morse immediate and full reinstatement to his former position of employment or, if such position no longer exists, to a substantially equivalent position of employment, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings he may have suffered as a result of his discharge, with interest.

WE WILL expunge from our files any reference to the reprimand and discharge of Christopher Mark Morse for his participation in protected concerted activity, and notify him in writing that this has been done and that evidence of this unlawful conduct will not be used as a basis for future personnel actions against him.

WE WILL rescind our overly broad no-solicitation rule.

PEERLESS PLATING COMPANY, INC.

DECISION

STATEMENT OF THE CASE

WILLIAM A. POPE II, Administrative Law Judge: The complaint in this case was issued by the Regional Director for Region 7 on December 18, 1980, based on a charge filed by Christopher Mark Morse, the Charging Party, on October 10, 1980. The complaint, as amended at the hearing, alleges that between August 15 and September 10, 1980, Peerless Plating Company, Inc., the Respondent, advised Morse that he could not conduct union business; threatened to discharge him; and issued written reprimands to and discharged Morse because he

[1] We shall modify the Administrative Law Judge's recommended Order so as to require Respondent to expunge from its files any reference to Christopher Morse's discharge, and to notify him in writing that this has been done and that evidence of this unlawful conduct will not be used as a basis for future personnel actions against him. See *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

The Administrative Law Judge inadvertently neglected to include in his recommended Order a provision requiring Respondent to preserve and, upon request, provide the records necessary to analyze the amount of backpay due to Morse. We shall modify his Order accordingly.

In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

engaged in the protected concerted activity of complaining about safety and health conditions at the Respondent's place of business, and other protected concerted activity, all in violation of Section 8(a)(1) of the Act. The complaint further charges that the Respondent maintains an overly broad no-solicitation rule, in violation of Section 8(a)(1) of the Act. A hearing on the issues was held in Muskegon, Michigan, on October 21, 1981, before me.

I. ISSUES

The issues in this case are (1) was Christopher Morse fired by the Respondent on September 10, 1980, because he had engaged in actions which constituted protected concerted activities under Section 7 of the National Labor Relations Act, as amended (the Act), in violation of Section 8(a)(1) of the Act, and (2) does the Respondent maintain an overly broad no-solicitation rule.[1] Counsel for the General Counsel argues that the Respondent fired Morse because he had engaged in the protected concerted activity of protesting health and safety conditions at the Respondent's plant, or, alternately, because he had engaged in the protected concerted activity of protesting fluctuating second-shift hours. Counsel for the General Counsel also argues that the Respondent maintains an overly broad no-solicitation rule, since its shop rules prohibit "unauthorized soliciting or collecting contributions for any purpose." The Respondent contends that it did not violate Section 8(a)(1) by firing Christopher Morse, because he was fired by his supervisor for poor work and complaints about working hours, not amounting to protected concerted activity. I disagree.

II. BACKGROUND

The Respondent is engaged in the manufacture, sale, and distribution of electroplated stamped and machined parts, and related products. Its sole place of business is located at 2554 Getty Street, Muskegon, Michigan.

The International Association of Machinists and Aerospace Workers (the Union), with which the Respondent has a collective-bargaining agreement, is a labor organization within the meaning of Section 2(5) of the Act.

Christopher Morse was employed by the Respondent as a plater from January 1 to September 10, 1980. His job as plater generally involved the "hanging" or placing of metal parts on the rack of a plating machine which dipped the parts in a series of chemical baths for plating and rinsing purposes, after which Morse removed the parts from the racks and placed them with other plated parts.

Morse worked steadily from the date he was hired until May 1, when he sustained a nonwork related injury to his leg which forced him to take 4 to 5 weeks of medical leave. During the initial period of his employment, the second shift, of which Morse was a part, was warned by the Respondent for losing parts and performing work poorly. On June 17, less than 2 weeks after Morse returned to work following his injury, he received a warning for hanging parts improperly. The Respondent's records, admitted at the hearing, suggest that Morse then took 2 weeks of vacation leave beginning on June 30.

Sometime during the middle or toward the end of July, Morse and his foreman, John Edsall,[2] had a discussion before the beginning of their shift, during which, according to Morse, he brought to Edsall's attention a list of what Morse perceived to be health and safety problems at the Respondent's plant.[3] Morse further testified that Edsall responded by warning Morse not to raise such issues because he could run the risk of being fired as a troublemaker. Edsall, on the other hand, testified that the conversation concerned only Morse's request for an additional light in his work area, and Edsall's explanation of why such an addition was impractical. No cautionary statements were made, according to Edsall.

On July 29, at the Union's regularly scheduled meeting, Morse raised a number of complaints about safety conditions at the Respondent's plant. Union officials agreed to take up the problems with the Respondent; however, in Morse's opinion, nothing was ever done about the problems.

On August 12, 1980, Morse threw away what he thought were defective springs of 100 specially made springs which he had been directed to plate. The following day, August 13, Morse was cautioned by Foreman Edsall not to throw out parts from jobs that had attached to them a certain type of pink slip—signifying the important nature of the job and the need to account for all parts.

On August 14, 1980, Morse, apparently for the first time, asked Edsall if he could report to work in accordance with the work hours specified in the collective-bargaining contract between the Respondent and the Union.[4] Edsall responded that no one had ever paid any attention to the hours specified in the agreement. The next day Morse requested that Plant Manager James Sowa show him his work record. Sowa told Morse that he could see his records on August 17, at which time he would receive a written reprimand for throwing out parts on August 12. Morse, in fact, was reprimanded by Sowa on August 17 for throwing out parts and for discussing union business.

On the next day, August 18, 1980, Morse filed a complaint with the State of Michigan Department of Labor, Bureau of Safety and Regulation, alleging health and safety hazards existed at the Respondent's plant. This complaint resulted in safety inspections of the Respondent's plant by the State on September 2, 3, and 9. On the first day of the state inspection, Plant Manager Sowa inquired of the inspector the identity of the complaining person or persons, but was told that such information was confidential.

---

[1] The Respondent stipulated that it has been at all times material herein an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.

[2] The Respondent admitted in its answer to the General Counsel's complaint that Foreman John Edsall and Plant Manager James Sowa are supervisors within the meaning of Sec. 2(11) of the Act.

[3] Morse testified that the safety problems which he raised included lack of protective clothing, inadequate ventilation, dangerous metal plates on floors, and lack of safety railings around plating machines.

[4] Art. X, sec. 10.3, states that "The first shift shall begin at 7 a.m. and end at 3 p.m. The second shift shall begin at 11 p.m., and end at 7 a.m." Morse's hours varied from these.

When he arrived at work on September 3, Morse found a note attached to his timecard, stating that he had left the water running in the cadmium machine he had operated the day before. Six days later, on September 9, the entire second shift, of which Morse was a part, was again warned about poor work. On the same day, Morse experienced plating problems which, he claimed at the hearing, were the result of some mechanical or chemical malfunction beyond his control, and that Edsall was aware of the problem. Edsall, on the other hand, testified that Morse's plating problems on September 9, were caused by the improper hanging of parts on the plating machine's racks.

On September 10, Morse received a warning for having hung parts wrong on the day before and for placing plated parts on top of raw parts. Subsequently, during the September 10 shift, Morse asked Edsall for a meeting to talk about the warning he had received hours earlier. Edsall agreed, and the meeting, for which Allen Carpenter, the acting union steward, was also present, took place in the front office. The conversation between Morse and Edsall covered a number of different issues, including Morse's reprimand and withdrawal of his privilege of listening to a radio during worktime, but the principal topic was Morse's desire to work the shift hours specified in the collective-bargaining contract. After a short period of time, Edsall said that he had work to do; that there was nothing he could do about the shift hours; that the union membership had agreed not to worry about the contract hours;[5] and, that Morse should take his complaint about working hours to the Union. Morse followed Edsall out the office door and repeated his complaint about the shift hours. Edsall turned to Morse and told him that he could come in the next day and raise his problems with Plant Manager Sowa.

Morse then asked Edsall if that meant that he was fired. Edsall responded that it did if Morse wanted it to.

Morse immediately requested that Acting Union Steward Allen Carpenter file a grievance concerning the firing, and together they prepared a written grievance alleging that Morse had been fired because he had filed a complaint with the State of Michigan concerning safety problems at the Respondent's plant. On September 15, a grievance meeting was held between Morse, union representatives, and representatives of Respondent, during which the Respondent's president, Scott D. Musselman asked Morse why he had turned in the Company. The grievance meeting did not result in Morse being rehired, and the Union eventually dropped the grievance before the arbitration stage.

III. FINDINGS AND CONCLUSIONS

1. The termination of Christopher Morse's employment

The record in this case does not sustain the allegation that Morse was fired by the Respondent because he had complained about safety and health hazards in the Respondent's plant; however, I find that the record does prove beyond question that Morse was fired because of persistent complaints to his inmediate supervisor that the working hours set by the Respondent did not conform to the provisions of the collective-bargaining agreement between the Respondent and the Union.[6] Morse's attempts to enforce the provisions of the collective-bargaining agreement constituted a protected concerted activity within the meaning of Section 7 of the Act, and, therefore, the Respondent's action in firing him because of such activity violated Section 8(a)(1) of the Act.

John Edsall, Morse's immediate supervisor, testified as follows concerning the circumstances under which he fired Morse:

> JUDGE POPE: Mr. Edsall, did you have any intentions of firing Mr. Morse when you met with him at the start of the meeting on September 10?
>
> THE WITNESS: September the 10? No, I did not.
>
> Q. Well, what happened during that meeting which caused you to fire him?
>
> A. Well, we went in the office, and he kept me [sic] bugging me about, like I said, about that light and about the hourly rate—the hourly working conditions, and I had the steward there, and I told him I did not have no control over that. And he kept on bugging me about it.
>
> And I told him, "Chris," I said, "our break is over, we're on company time, lets go back to work."
>
> An then we went to walk out the door he says—I reco—recocall [sic] what he said, because he was behind me, and that, and he come up there and I told him, I says, "Chris, don't bug me any more." I said, "Come in tomorrow and see Mr. Sowa."
>
> And he turned around and looked at me right away, and he says, "Well, in other words, then," he said, "I'm fired, ain't I?"
>
> And I said "If you want to take it that way that's all right." So I said, "Yes, you're fired. Go home."
>
> * * * * *
>
> Q. JUDGE POPE: All right, you did not intend to fire Mr. Morse at the start of the meeting on September 10. That's right isn't it?
>
> A. THE WITNESS: Right.
>
> * * * * *
>
> Q. Just to be clear about the matter in my mind. At the time that you let Mr. Morse go, you also did not know that he had filed a complaint with the state health authorities or safety authorities concerning the working conditions in the plant, is that true?
>
> A. That's true.

[5] Testimony at the hearing by Acting Union Steward Allen Carpenter suggests that the union membership had voted to ignore the contract shift hours language on at least two occasions.

[6] The complaint initially charged only that Morse was fired because of the safety complaints he had made; however, at the hearing the complaint was amended to include "and other concerted activity" as reason for his being fired by the Respondent. As amended, the complaint fairly encompasses the allegation that Morse was fired, at least in part, because of his activities involving enforcement of the collective-bargaining agreement.

Q. And the only things that influenced your decision to fire him were his poor work quality and the fact that he was bugging you about the hours of work. Is that correct?

A. That's correct.

It is clear from Edsall's testimony, which I find to be credible in this regard, that he fired Morse solely because of Morse's persistent complaints about working hours, and that he made the decision to fire Morse without prior discussion or consultation with his superiors concerning termination of Morse's employment. The Respondent conceded that Edsall fired Morse because of the working hours dispute, but contends that in addition Morse was fired because of poor work. The latter contention is entirely unsupported by the record, and I find that the reason Morse was fired on September 10, 1980, was because of his persistent complaints to Edsall concerning the Respondent's failure to observe the working hours specified in the collective-bargaining agreement. It is clear that the Respondent was not satisfied with Morse's work, and, conceivably might have fired him at some later time for that reason. But, it was Morse's persistent complaints about working hours, and not his alleged poor work record, which prompted Edsall to fire him on September 10, 1980. Edsall had no previously formed intention of firing Morse for poor work on September 10. His decision to terminate Morse's employment was a spontaneous reaction to Morse's refusal to drop the working hours issue.

While it is undisputed that Morse complained about safety matters first to his foreman, John Edsall,[7] then to his union, and finally to state authorities, there is no creditable evidence that Edsall, whose independent decision it was to fire Morse, knew of Morse's safety complaints to the Union or to state authorities, or that his decision was in any way influenced by any complaint which Morse may have made to anyone concerning safety. Although there is conflicting testimony as to whether Plant Superintendent James. A. Sowa was aware of the safety complaints which Morse raised at the union meeting, and as to whether Sowa tried to find out who had made the complaint which caused the state authorities to conduct a safety inspection at the plant, there is no evidence that Sowa had any part in the decision by Edsall to fire Morse, and, therefore, it is unnecessary to the disposition of this case to resolve these and other related conflicts in the evidence.[8]

Employee attempts to enforce the provisions of an existing collective-bargaining agreement are protected, regardless of the employer's or the Board's appraisal of the validity of the employee's interpretation of the contract. *Interboro Contractors, Inc.*, 157 NLRB 1295, 1298 (1966); *James T. Hughes Sheet Metal, Inc.*, 224 NLRB 835 (1976); *Maryland Shipbuilding and Dry Dock Co.*, 256 NLRB 410 (1981). Contrary to argument by counsel for the Respondent, Morse's complaints about his shift hours concerned more than the employee's individual interest. Where a contract exists,[9] an individual employee's attempts to enforce its provisions constitutes a concerted activity affecting group interest because the employee's "activity in demanding obedience to the collective-bargaining agreement [is] but an extension of the concerted activity giving rise to that agreement." *Albertson's, Inc.*, 252 NLRB 529, 536 (1980).

It is clear, therefore, and I so find, that Christopher Mark Morse was discharged by the Respondent because he engaged in a protected concerted activity within the meaning of Section 7 of the Act. In discharging Morse, the Respondent therefore violated Section 8(a)(1) of the Act.

2. The warning not to discuss union business

In addition to being reprimanded on August 17, 1980, for throwing parts away, Morse was also admonished orally and in writing not to discuss union business. Although the written admonition concerns discussion of union business during working hours, Morse contended in his testimony that James Sowa's oral warning was much broader, prohibiting him from discussing union business on plant property. Sowa, for his part, testified that he told Morse "that the men did not want to discuss union business with him. They were getting tired of it, and they asked me personally to come in and tell him to quit talking about union business. . . ."

Sowa's testimony is ambiguous as to the extent of the prohibition which he orally placed upon Morse concerning the discussion of union business, compared to the more carefully phrased admonition inserted in Morse's personnel records. In this instance, I find Morse's testimony concerning the nature of the oral warning given to him by Sowa to be the more credible. To make his point, Sowa imposed an oral admonition which was overly broad and failed to make it clear that Morse was only restricted from discussing union business during actual working hours in the work areas of the Respondent's plant. What discussions Morse may have had with his fellow employees during nonworking hours in nonwork areas of the Respondent's plant,[10] and whether the other

[7] The testimony of Morse and Edsall are in conflict concerning the nature of the safety complaints expressed by Morse to Edsall, and Edsall's response. The record, however, substantiates Edsall's testimony that his decision to fire Morse was spontaneous and unrelated to safety matters.

[8] While I find from the evidence that Morse was not fired by Edsall because of safety related complaints, a much better case can be made that the refusal by the Respondent's nanagement to rehire Morse following the grievance meeting on September 15, 1980, was motivated in large part by disclosure that it was Morse who complained to state authorities about alleged safety violations in the Respondent's plant. But, in view of the finding that Morse was engaged in a protected concerted activity when he was fired by Edsall, I find it unnecessary to reach the issue of whether management's subsequent refusal to rehire Morse also violated Sec. 8(a)(1).

[9] Evidence has been presented suggesting that the collective-bargaining contract was formally modified by the vote of the union membership to ignore the contracts shift hour provision. Art. XIX, sec. 191, of the contract provides that "this agreement shall become effective March 1, 1980, and shall remain in full force and effect until March 1, 1983." The decision of various union members to ignore the contract, standing alone, cannot be characterized as a mutual agreement between the contracting parties to amend the contract. Without such an amendment, the contract's provisions dealing with shift hours, art. X, sec. 10.3, were in full force and effect on September 10, 1980, when Morse made his complaints to Edsall.

[10] *AMC Air Conditioner Co.*, 232 NLRB 283 (1977).

employees were willing or unwilling listeners, were of no legitimate concern of Sowa or the Respondent. From the discrepancies between Sowa's oral testimony and the written admonition, I conclude that he knew there were legal distinctions and sought to protect himself and the Respondent when it came time to reduce the warning to writing by limiting its application to working hours. Even if the written admonition was legally proper, a finding which I expressly do not make, it does not eliminate the improper oral warning or its effect. I find that the oral warning concerning discussion of union business given by Sowa to Morse on August 17, 1980, was in violation of Section 8(a)(1) of the Act.

3. No-solicitation rule

Respondent's shop rules state that:

> Committing any of the following will be grounds for disciplinary action as follows: One week off without pay to discharge depending on the seriousness of the offense. . . .
>
> 5. Unauthorized soliciting or collecting of contributions for any purpose.

In the absence of any showing of special need, an employer rule that attempts to regulate employee solicitation conduct in nonwork areas during nonwork time is presumptively in violation of Section 8(a)(1) of the Act. *American Cast Iron Pipe Company*, 234 NLRB 1126 (1978). An employer may not require permission of management as a condition precedent to employee concerted activity. Requiring such permission promotes fear of management interference and retaliation. *AMC Air Conditioning Co., supra.*

The Respondent in the case at bar has not cited any special need to legitimize the breadth of the rule in question nor the rule's permission requirement. Promulgation of the rules as written is a violation of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. On September 10, 1980, the Respondent terminated its employment of Christopher Mark Morse because Morse engaged in protected concerted activity by attempting to enforce provisions of the collective-bargaining agreement between the International Association of Machinists and Aerospace Workers, Local Lodge No. 670, and the Respondent. The Respondent thereby violated Section 8(a)(1) of the Act.

3. On August 17, 1980, the Respondent verbally warned Christopher Mark Morse not to discuss union business on company property and thereby violated Section 8(a)(1) of the Act.

4. The Respondent violated Section 8(a)(1) of the Act by promulgating an overly broad no-solicitation rule.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent engaged in certain unfair labor practices, I find it appropriate to order the Respondent to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having committed an unfair labor practice by unlawfully discharging its employee, Christopher Mark Morse, shall offer to reinstate him to his former employment, without prejudice to any rights or privileges, and make him whole for any loss of earnings he may have sustained as a result of the termination of his employment.

The Respondent, having committed an unfair labor practice by reprimanding its employee Christopher Mark Morse for discussing union business on company property shall be required to rescind the reprimand and withdraw any reference to the reprimand from the personnel record of Christopher Mark Morse.

The Respondent, having committed an unfair labor practice by unlawfully promulgating an overly broad no-solicitation rule, shall rescind that rule.

Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977); see, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended:

ORDER[11]

The Respondent, Peerless Plating Company Inc., Muskegon, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging employees because of participation in protected concerted activities within the meaning of Section 7 of the Act.

(b) Reprimanding employees because of participation in protected concerted activities within the meaning of Section 7 of the Act.

(c) Promulgating overly broad no-solicitation rules within the meaning of Section 7 of the Act.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Offer Christopher Mark Morse immediate and full reinstatement to his former position of employment or, if such position no longer exists, to a substantially equivalent position of employment, without prejudice to his seniority or other rights and privileges previously enjoyed,

[11] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

and make him whole for any loss of earnings he may have suffered as a result of his discharge, in the manner specified in the Remedy section of this Decision.

(b) Withdraw any written reprimand of Christopher Mark Morse for his participation in protected concerted activity from the personnel records of Christopher Mark Morse maintained by the Respondent.

(c) Rescind its overly broad no-solicitation rule.

(d) Post at its place of business in Muskegon, Michigan, copies of the attached notice marked "Appendix."[12] Copies of said notice, on forms provided by the Regional Director for Region 7, shall be signed by Respondent's duly authorized representative and posted immediately upon receipt thereof, and shall be maintained and displayed by Respondent for 60 consecutive days thereafter, in conspicuous places, at its place of business in Muskegon, Michigan, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[12] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."